No. 01-1629 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

STATE OF MARYLAND,

Petitioner

v.

CLARENCE CONYERS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Respondent accepts the Petitioner's initial question presented. Respondent adds the following additional questions presented.

2. Should the State be permitted to offer testimony by a police officer that the officer verified "each and every statement that [Charles Johnson, a jailhouse snitch] gave to us" based on non-public information, E. 554, when in fact the officer knew that many statements Johnson made without basis in the public record could not be verified or were disproved by the police, and where Respondents' counsel was unaware of the lack of verification of Johnson's statements?

3. Were Respondents' prior attorneys ineffective where prior counsel cross examined Charles Johnson without obtaining available evidence that Johnson had previously lied in detail to the police about his participation in an armed robbery, lied to his employer about his criminal record, lied again when caught by his employer lying about his criminal record, and failed to pay taxes for years immediately preceding his testimony?

4.Was Respondents' Sentencing Counsel Ineffective in Failing to Adequately Present Mitigation Testimony and Evidence, Where Such Testimony by Experts such as a Social Worker or a Psychologist Could Only Have Presented Mr. Conyers in a Better Light to the Sentencing Jury?

5. Did the Petitioner State's summations at trial and sentencing violate Due Process where the State vouched for Charles Johnson's credibility based on false testimony and implied in the trial summation that the jurors should be afraid of Mr. Conyers?

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Respondent, Clarence Conyers, by counsel, respectfully requests that the Court deny the petition for writ of certiorari filed by the State of Maryland ("Petitioner" or "State") as there has been no showing that the question presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

To the extent not disputed or supplemented below, Respondent adopts the Petitioner's Statement of the Case but offers the following supplemental information to the Court. References to the Record Extract, the opinion of the Maryland Court of Appeals reversing Mr. Conyers' conviction, Conyers v. State, 367 Md. 571, 790 A.2d 15 (2002), and other documents follow the State's format in its Petition.

First, in this case the State did not merely fail to disclose impeachment evidence relating to Charles Johnson, the jailhouse snitch, the State's key witness showing Mr. Conyers was a principal in the first

degree in murdering the victim. The State offered false testimony, knowing it was false at the time, by the jailhouse snitch Charles Johnson and by Det. Marll, a Baltimore County police officer, both about the circumstances which led the jailhouse snitch Charles Johnson to cooperate and testify and about the results of the efforts by police to verify Johnson's information. The State's Petition implies that this case merely involves its failure to disclose exculpatory information. However, the State elicited testimony that "Johnson did not ask for any favors in return for the information he provided," yet the State now admits before this Court that "Johnson began negotiations for a possible benefit when it came time to sign his statement." Petition for Writ of Certiorari at 8, 18 (hereinafter, "Cert. Pet."). Although the Court below found that the standard of review applicable to false testimony "is not indicated" and that "we shall not find that the State offered perjured testimony," App. n. 32, 44a-45a and 56a, the Court also commented that the State's approach and its witnesses' responses were "deceptive" and "intended to evade the thrust of [counsel for Respondent's] questioning." Id.

In this case, the State did not merely fail to disclose material impeachment information: the State offered testimony that had the effect of affirmatively misleading the jury as to the truth regarding Charles Johnson the jailhouse snitch's efforts to obtain a benefit for his cooperation. The State also improperly vouched for the veracity of the snitch Johnson's testimony when it knew that Johnson had not told the truth as to his motivation to cooperate. In its trial summation, the State argued repeatedly and falsely that Johnson told the truth. E. 304 ("[H]e came in here and told the truth because it was the right thing to do"), E. 319 (Johnson "walked in here and said the truth, he complied with his plea agreement"). The State

knew at that time that Johnson had not told the truth in his testimony.

Second, the State incorrectly claims in its Statement of the Case that "[a]t the post conviction hearing, Detective Marll repeated his trial and re-sentencing testimony regarding the interview with Charles Johnson and Johnson's written statement." Cert. Pet. at 9. If all Det. Marll did in his testimony during the post conviction hearing was repeat his prior testimony regarding the snitch Johnson's cooperation, then the State's failure to disclose evidence and false testimony now before this Court on the State's Petition would never have been discovered. Instead, the officer Det. Marll essentially admitted facts showing that he and Johnson had mislead the jury previously and falsely denied that Johnson had sought a personal benefit for his cooperation.

Third, the State's Statement of the Case asserts that "[t]he Court of Appeals of Maryland on direct review of the death sentence agreed that the jury was provided a full picture of Johnson." Cert. Pet. at 8-9. However, the Maryland Court of Appeals reached that conclusion without the benefit of the evidence in the post conviction hearing that Johnson sought a benefit at the start of his cooperation and that, contrary to the officer's testimony, much of the information Johnson provided was either disproven or could not be proven by the police. When the Maryland Court of Appeals received a more complete picture of Johnson after the post-conviction hearing, it concluded in the decision under attack in this court by the State that the jury was <u>not</u> provided a full picture of the jailhouse snitch Charles Johnson. Thus, the Maryland Court of Appeals appropriately ordered a new trial, a judgment under attack in this Court by the State.

Fourth, the State fails to advise this Court in its Petition of the numerous issues before the Court falling outside the scope of the

Petitioner's single narrowly crafted Question Presented. In fact, the State incorrectly informs the Court that such matters are "not before the Court." Cert. Pet. at n. 2, pp. 11-12. However, any matter not decided by the Maryland Court of Appeals but properly raised in that Court by Respondent which would support that Court's reversal of the conviction and sentence, and thus affirm the judgment under attack by Petitioner, is properly before this Court. As to these numerous issues, the Maryland Court of Appeals simply stated that "[w]e shall not reach [Mr. Conyers'] remaining issues." App. 60a. A brief summary of the pertinent facts pertaining to those issues identified in the Questions Presented above is set forth below in the Statements of Reasons Why the Writ Should Not Be Granted.

REASONS FOR DENYING THE WRIT

The State contends that certiorari is merited where this case raises an important question on the scope of a prosecutor's discovery obligations, there is a conflict between the Maryland Court of Appeals' decision and decisions of other state courts, and where there will be negative public policy consequences of the judgment if it is not reversed. Upon close review, none of these reasons justify issuing the writ, and there are other issues raised by review of the judgment which also show why the writ should not issue.

1. The Scope of a Prosecutor's Duty to Disclose the Details of Plea Negotiations is Fact Specific and Unworthy of Review by this Court

The State contends that this Court ought to grant certiorari to decide whether the State has a duty to disclose details of plea negotiations pursuant to its obligations under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). This Court has

addressed the prosecution's disclosure obligations in numerous prior cases involving impeachment of prosecution witnesses, including recent decisions. See Strickler v. Greene, 527 U.S. 263 (1999); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985); Giglio v. United States, 405 U.S. 150 (1972)(prosecution required to disclose evidence of promise to key witness); Napue v. Illinois, 360 U.S. 264 (1959)(failure of a prosecutor to correct the false testimony of a witness denies a defendant due process where disclosed evidence did not "turn what was otherwise a tainted trial into a fair one"). Applying those principals to a prosecutor's disclosure obligations is a fact specific inquiry, poorly suited to review by this Court on the facts of this case, and properly left to lower courts. The decision regarding materiality is fact specific. Information which could be irrelevant in one case could in another case be absolutely critical. For example, in this case the fact that Charles Johnson the jailhouse snitch sought a benefit for his cooperation when he provided a statement to the police was particularly material in light of his denial under oath that he cooperated to help himself, testimony by a police officer that Johnson never asked for a benefit when he did seek a benefit, and the State's summation argument that Johnson told the truth. Thus, the materiality of the withheld information increased as the State offered evidence and argument inconsistent with Johnson's request for a benefit. As the Maryland Court of Appeals put it, "the State was an active participant in the smoke and mirrors effort to mislead [Mr. Conyers] and jury as to the full circumstances preceding and precipitating Johnson's plea agreement." App. 59a.

By contrast, in a case where a cooperating witness seeks a benefit from the start of his cooperation, the prosecution discloses the plea

agreement, the cooperator admits on the stand that he cooperated to obtain a benefit, and the prosecution remains silent at trial as to the cooperator's motive to testify, the absence of any disclose would not be as compelling as it is in this case. Under those circumstances, unlike the circumstances in this case, the prosecution's failure to disclose could have less impact on the jury's deliberations.

By way of another example, one among many, in a particular context the prosecution's obligation to turn over evidence for impeachment purposes extends to proffers made by counsel which are inconsistent with testimony later given by a State's witness. In Spicer v. Roxbury Correctional Institute, 194 F.3d 547 (1999), a decision in a Section 2254 action not appealed by the State to this Court but cited by the State, Cert. Pet. 25-27, the prosecutor failed to inform the defense that the State's key witness, a jailhouse informant much like Charles Johnson, had previously given his attorney a different version of the events than that to which he had testified. The Fourth Circuit Court of Appeals found the State's failure to disclose to be a violation of Brady, Giglio, and their progeny.

Thus, because the prosecution's duty to disclose details of plea negotiations, and to disclose its knowledge of a witnesses' motive to cooperate, is a fact-specific inquiry, a new decision by this Court on the extent of a prosecutor's duty to disclose such matters beyond the text of a plea agreement would not provide guidance to the lower courts applicable in other cases and would do no more to provide guidance in such situations to prosecutors , defense counsel and the courts than current cases provide.

2. The Cases Cited By The State As Conflicting Authority Are Factually, And Thus Legally, Distinguishable And, Therefore, Do Not Conflict With The Decision Below.

The State argues that "[t]he decision below conflicts with rulings of other state and federal jurisdictions considering similar Brady claims," Cert. Pet. at 20, and cites two lines of cases— state cases from Indiana and Georgia and federal circuit court cases—in support of that argument. The State goes on to quote selected sentences from selected portions of these cases in what is essentially the citation of obiter dicta. All of the cited cases, however, are factually distinguishable from the instant case and, thus, their holdings do not conflict with the holding of the Maryland Court of Appeals below.

First, in many of the cases, the various appeals courts found that the defendant had simply failed to prove its allegation that there was an undisclosed interaction with the State that provided the particular witness's motivation for testifying. For example, in Rubalcada v. State, 731 N.E. 2d 1015 (Ind. 2000), Rubalcada's accomplice in a drug related murder—Moreno—testified at trial that he had been offered, but had not yet accepted, a plea bargain wherein he would receive 45 years in prison on a guilty plea to murder. Four months after the trial, Moreno pleaded guilty and received a 35-year sentence. The Indiana appeals court held that, despite the difference in sentences, there was no evidence that Moreno's motivation for testifying was anything other than the original plea bargain as disclosed by the prosecution. Id. at 1023-1024.

In Wright v. State, 690 N.E.2d 1098 (Ind. 1988) , an accomplice who supplied the murder weapon—Turner—testified at Wright's trial that he was to stand trial himself later without the benefit of a plea bargain.

Shortly after Wright's trial, however, key witness Turner had his charge reduced from one carrying a maximum of 50 years in prison to one carrying a maximum of eight years in prison and, after pleading guilty, was sentenced to four years. The Indiana appellate court affirmed the factual finding of the trial court, holding that the Defendant had produced no evidence to prove its allegation that there had been a "secret deal" between this witness and the prosecution. Id. at 1112-1115. See also Sigler v. State, 700 N.E. 2d 809, 811-812. (Ind. App. 1998). (Conviction affirmed because trial court not clearly wrong in factual finding that Defendant had not proven allegation of undisclosed pretrial plea agreement of testifying witness.) Id. at 811-812; Lopez v. State, 527 N.E.2d 1119, 1128-1129 (Ind. 1988). (Conviction affirmed because trial court not clearly wrong in factual finding that allegation of undisclosed pretrial promise to reduce witness's sentence not proven.) Id. at 1128-1129; Alderman v. Zant, 22 F.3d 1541 (11th Cir. 1994) (Trial court's factual finding that there was no promise, understanding or agreement was supported by the record.) Id. at 1553-1555.

In some other of the State's cited cases, the appellate court denied relief because the alleged undisclosed promise, even if it was made, presented only harmless error. For example, in McClesky v. Kemp, 783 F.2d 877 (11th Cir. 1985), The Eleventh Circuit held that an allegedly undisclosed police promise to "speak a word for [the witness]" on a pending escape charge would not have affected the jury's decision since the witness, who was testifying against McCleskey in a capital murder case, had already been extensively impeached at trial and, in any event, testified only as to facts that had already been established by two eyewitnesses, McCleskey's accomplice, and McCleskey's own confession. Id. at 884-885. See also

Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) (Agreement as to where witness would serve time, if such agreement existed, was not material since accomplice/witness in murder case had already been extensively impeached with his favorable plea agreement and other factors.) Id. at 600-602; Patillo v. State, 368 S.E.2d 493 (Ga. 1988) (Failure to disclose agreement to inform judge in witness's violation of probation case of witness's testimony in death penalty sentencing was harmless when death penalty was likely imposed due to brutal nature of crime and defendant's own post-crime written statements, and not due to witness's recitation of defendant's statements to witness.) Id. at 496-498.

In stark contrast in the instant case, the court below found that the undisclosed testimony-inducing interaction was both proven and material. Indeed, the court below found that there was "no question" that the undisclosed interaction—the seeking of a benefit from the State by jailhouse snitch Charles Johnson—had occurred, App. 39a, and that it was "undisputed" that this evidence was withheld from Conyers' lawyers. App. 41a. The court below further held in no uncertain terms that, had the withheld evidence "been disclosed, there was a substantial possibility that the outcome would have been different." App. 56a. Moreover, in the instant case, unlike in any of the State's cited authority, the State did not sit idly by at trial but, rather, seized on the lack of this withheld evidence by consistently trumpeting jailhouse snitch Charles Johnson as a man who came to police and thereafter testified at trial simply to help the quest for truth and not to help himself. App. 25-26. Thus, the decision below turns on entirely different considerations and, therefore, does not conflict with the decisions cited by the State. Consequently, review by this Court on this basis is unwarranted.

3. There Are No Unfortunate Public Policy Consequences of the Court of Appeals' Decision Compelling Review By This Court

The State contends in essence that the Maryland Court of Appeals' decision burdens it with unnecessary and unjustified discovery obligations. Cert. Pet. at 27. It claims that the decision compels prosecutors to "ascertain the details of verbal sparring between the police and a potential witness or to scrutinize the prosecutor's own negotiations with a witness." Id. It also contends that the decision in effect compelled the prosecutor "once he negotiated a plea and disclosed that information to Conyers' attorney to search out from either Johnson or the police some detail of the negotiations that might be perceived as favorable to Conyers." Id.

The State is crying wolf by pointing to the supposedly dire consequences of the Maryland Court of Appeals' decision in this case. The decision requires the State to accurately portray plea negotiations to the jury in the presentation of evidence and summation. Here, the State injected affirmatively misleading testimony into the record by allowing the snitch Charles Johnson and the police, including Det. Marll, to misrepresent their dealings with each other. The decision did no more than require the State's witnesses to tell the truth, and tell the State that it must offer truthful testimony. As far as any burden on prosecution is concerned, the State has long been obligated to learn what its agents, including the police and its witnesses, know which maybe exculpatory or material impeachment. The Maryland Court of Appeals did not add to the State's discovery obligations one iota.

Lastly, the State claims as a public policy consideration that the undisclosed impeachment information "was equally available to Conyers

through reasonable diligence." Cert. Pet. at 27. This factual claim, although never raised in the post-conviction hearing court by the State, and thus completely unsupported by any evidence offered by the State, was nonetheless addressed and squarely rejected by the Maryland Court of Appeals. "This Court is satisfied from review of the relevant portions of the record that the factual predicate underlying [Mr. Conyers'] Brady claims relating to the testimony and examination of Charles Johnson did not arise until the post conviction evidentiary hearing, at which point [Mr. Conyers] properly raised these issues." App. 33a. There was no factual error by the Maryland Court of Appeals, and even if there were, it is not worthy of review by this Court.

4. Perjurious State Testimony Falsely Claiming that All of the Jailhouse Snitch's Information Was Verified by Police, An issue Raised In But Not Decided by the Maryland Court of Appeals, is an Independent Basis to Uphold the Judgment Below Requiring a New Sentencing

As the prevailing party below, Mr. Conyers can defend the judgment of the Maryland Court of Appeals requiring a new trial "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the" Court of Appeals. See Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20 (1979). Part of the judgment below was a finding that the failure to disclose information about the jailhouse snitch pertaining to his effort to secure a benefit required a new trial and was not limited to a new sentencing. However, there were issues pertaining to the sentencing proceeding which were before the Maryland Court of Appeals and were not decided by it which independently support the judgment below to the extent that they compel a new trial or only a new

sentencing.

First and foremost of those issues is the State's false testimony regarding police verification of Charles Johnson the jailhouse snitch's information. The State's witness Det. Marll testified at sentencing that the Baltimore County Police investigated the snitch's representations, which were not contained in the public papers the snitch might have found in Mr. Conyers' jail cell, and all of the snitch's allegations regarding the non-public facts were truthful and were confirmed through police investigation. E. 554. Det. Marll's post conviction hearing testimony showed that his earlier testimony at sentencing that he had verified everything the snitch Charles Johnson told him and found it to be true was, in itself, false. Not only had the police failed to verify much of what the snitch Charles Johnson told them, the police actually found that the snitch provided information which the police determined to be untrue.

The unverified or disproved information in question, E. 1115-1137, was not information relating to insignificant details. The information included the location of the murder weapon, a key piece of evidence in any homicide case. The snitch Charles Johnson told Det. Marll that the murder weapon had been hidden in an attic. E. 1134. So significant was this information that Det. Marll personally searched the attic because Det. Marll told the police the weapon was there. E. 1135. The police did not find a weapon. E. 1135. Curiously, neither Det. Marll nor any other Baltimore County Police officer prepared any documentation about the unsuccessful search. E. 1135. This information, which would have cast serious doubt upon Charles Johnson the snitch's credibility, was never disclosed to the defense. Moreover, Det. Marll's testimony at the post conviction hearing revealed that the snitch Charles Johnson's testimony at sentencing was

false.

The Maryland Court of Appeals noted this issue in its opinion but made no finding on it. The State incorrectly contends that this "issue is not before this Court." Cert. Pet. at n.2 pp. 11-12. The State also contends that to the extent that Det. Marll's testimony about verification of the snitch Charles Johnson's information is in dispute, that testimony was provided at sentencing only at the invitation of Mr. Conyers' counsel. Id. That argument leads to Mr. Conyer's second independent basis to uphold the judgment as to the sentencing: that sentencing and trial counsel were ineffective in attacking the snitch Charles Johnson's credibility.

5. Ineffective Assistance of Prior Counsel Regarding Cross Examination of the State's Jailhouse Snitch Witness Charles Johnson, and Sentencing Counsel's Stipulation to False Testimony by Det. Marll, a State Witness, Regarding Verification of Information Provided by Johnson, Issues Raised In But Not Decided by the Maryland Court of Appeals, Are an Independent Basis to Uphold the Judgment Below

Mr. Conyers contended below that both his prior attorneys at trial and sentencing were ineffective in cross examining Charles Johnson, the jailhouse snitch, and that his sentencing attorney was ineffective in stipulating to false testimony by the State that it verified all of Johnson's information. The Court of Appeals did not reach these two issues, but these issues are an independent basis to uphold the judgment below requiring a new trial.

Both trial counsel, and sentencing counsel two years later, failed to cross-examine the jailhouse snitch Charles Johnson on prior false information he provided to the police. Johnson lied to Baltimore County Police, the same police department who investigated the murders at issue

in this case, in a detailed statement several months before he fingered Mr. Conyers as a murderer. E. 1241, 1249-1251. Johnson falsely denied that he helped rob a Wendy's Restaurant in Baltimore County. Id. His lies to the police led immediately to his arrest and his eventual guilty plea to conspiracy to rob the Wendy's, E. 1252. The statement of charges disclosing the jailhouse snitch Charles Johnson's previous lies to the police was a public record and the trial and sentencing counsel knew Johnson's prior record. E. 410. Thus, Mr. Conyers' attorneys could have obtained the statement of charges containing Johnson's lies, E. 1249-51, from the Court file. The statement could have been used by both attorneys to attack Johnson's credibility, yet neither lawyer retrieved the records and used them. E. 1045-1046. These records would have materially impeached the snitch Johnson's testimony at trial and sentencing and the failure to use this evidence in either proceeding is an independent basis to uphold the judgment below based on ineffective assistance of counsel.

Furthermore, there was additional evidence unavailable at the time of trial but available at the time of sentencing two years later which sentencing counsel could have used but did not use to cross examine Charles Johnson. First, Johnson lied to his employer Murry's Steaks about his criminal record. E. 1233. He falsely denied he was a felon, id., then lied again when confronted with his lies by denying his guilt and failing to disclose a prior robbery conviction. E. 1238. Although he had already pled guilty to the robbery, Johnson claimed that he "was charged with being an accessory to a robbery that I had no knowledge of nor was a part of." E. 1239.

Sentencing counsel agreed this evidence from Murry's Steaks would have been probative of Johnson's veracity. E. 1017-1019. Sentencing

counsel also testified that attacking Charles Johnson's credibility was the heart of his defense at sentencing. E. 1011, 1015.

Second, Johnson failed to file tax returns in 1993, 1994, or 1995, although he claimed on his Murry's Steaks job application that he earned enough to file. E. 907, 1235. Neither Mr. Conyers' trial nor sentencing attorneys investigated Johnson's tax records. E. 1218-1219.

Finally, on a related issue, sentencing counsel was ineffective in stipulating to Det. Marll's, the State witnesses', false opinion testimony that all of the snitch Johnson's non-public information had been verified. Sentencing counsel either did not know what the police had done to verify the statement or if he knew what they disproved then he knew he had stipulated to false testimony. Thus, sentencing counsel's decision to stipulate to the State's opinion testimony that all of Johnson's statements had been verified as truthful was unreasonable and ineffective representation.

6. Mr. Conyers' Sentencing Counsel was Ineffective in Failing to Adequately Present Mitigation Testimony and Evidence, Where Such Testimony by Experts such as a Social Worker or a Psychologist Could Only Have Presented Mr. Conyers in a Better Light to the Sentencing Jury

This issue is another basis, other than the basis designated by the Maryland Court of Appeals, to uphold the judgment below to the extent the judgment required a new sentencing. Sentencing counsel failed to present mitigating evidence at sentencing. He failed to hire a social worker to conduct a psycho-social history of Mr. Conyers' family. After deciding not to utilize an inadequate report completed for the prior sentencing, sentencing counsel failed to obtain his own report or live testimony

providing meaningful family history. Such testimony is routinely offered at capital sentencing hearings, E. 845-846 (standard practice to engage a social worker to assist on mitigation issues), and provides a meaningful framework for understanding the defendant rather than leaving the jury with only the crime to define him.

Sentencing counsel did not present testimony from a social worker or a psychologist supporting mitigation. The jury did not hear any of the compelling mitigation evidence presented at the post conviction hearing, yet all of it was available had sentencing counsel properly prepared for the sentencing. The report by the social worker E. 1221, was "exactly the kind of evidence that a competent attorney could and should present." E. 850. In Williams v. Taylor, 529 U.S. 362 (2000), this Court found that counsel's performance fell below Strickland standards when, like sentencing counsel in the present case, he failed to discover and offer mitigating evidence at sentencing. This failure on the part of counsel undermined the reliability of the outcome of Mr. Conyers' sentencing and requires that he receive a new sentencing hearing.

The extent of Mr. Conyers' involvement in the lives of his family members, especially his children, and the impact that his loss would have to such a close-knit family, offered substantial support to sentencing counsel's theory of mitigation which was that Mr. Conyers would not be a danger in the future. However, sentencing counsel "was unable to ask the witnesses [such as Mr. Conyers' mother and father] the questions that are standard in this type of work." E. 848-849.

Sentencing counsel's sole theory of mitigation in the case was that Mr. Conyers posed no danger to the public. Even that narrow and inadequate approach failed when the sentencing court properly barred

expert testimony on the subject. When asked what was his "plan B" once the court ruled inadmissible his entire effort at presenting mitigation, sentencing counsel indicated that, following the trial judge's suggestion, he simply argued theories of sentencing to the jury. Mr. Conyers' expert testified that sentencing counsels' handling of mitigation "demonstrates . . . they didn't have any idea what they were doing." E. 847.

Thus, sentencing counsel intended to rely on the only type of evidence which is not admissible at a capital sentencing. When it became clear that his approach to mitigation was incorrect, sentencing counsel did absolutely nothing. The compelling mitigation evidence presented at Mr. Conyers' post conviction hearing was available to sentencing counsel at the time of Mr. Conyers' sentencing, yet he utterly failed to present any of it without any strategic reason. Even worse, sentencing counsel's testimony at the post conviction revealed a lack of understanding of what kind of evidence is required from the defense in a capital sentencing.

The record clearly shows that sentencing counsel simply overlooked introducing the mitigation testimony offered at the post conviction hearing. He could not justify his lapse. There were no risks presenting such mitigation. Often mitigation evidence which deals with family pathology or pathological behavior of the accused can hurt the defense case. Here, there was no potential harm to revealing the extent to which Mr. Conyers made positive contributions to the lives of others, and how others, particularly his children, benefit from his life.

The record in the present case reveals that sentencing counsel failed to grasp the concept that a capital sentencing proceeding requires an investigation and presentation of evidence not typically presented in criminal trials. Sentencing counsel completely missed the value of such

evidence and in doing so missed the opportunity Mr. Conyers had to obtain a sentence less than death. Accordingly, counsel's performance was ineffective and Mr. Conyers is entitled to a new sentencing on that basis alone.

7. The State's Unobjected To Closing Arguments at Sentencing and Trial Require Relief

A final independent basis to uphold the Court of Appeals' judgment on a basis other than on the issue reached by that court is the State's closing arguments. Although the Court of Appeals noted that the State argued the jailhouse snitch Charles Johnson's credibility in closing, App. 59a-60a, its decision to order a new trial relied on a finding that the State failed to disclose exculpatory evidence rather than a finding that the State's summations at trial and sentencing were improper. However, both were improper, supporting the Court of Appeals' reversal on that basis alone.

In its trial summation, the State improperly argued repeatedly that Johnson told the truth. E. 304 ("[H]e came in here and told the truth because it was the right thing to do"), E. 319 (Johnson "walked in here and said the truth, he complied with his plea agreement"). The State so argued when it knew that Johnson's testimony had not been truthful as to the reasons he cooperated and his efforts to secure a benefit for himself through his cooperation. The State's improper vouching for Johnson came in the State's trial rebuttal, which followed both the trial court's charge and the defense summation, leaving the State with the final word on Johnson.

The State's numerous additional improper closing arguments at trial included the following: "If this man lives by any rules at all, he lives by this

one rule, don't leave any live witnesses." E. 305. "Ladies and gentlemen, do you want to see what a real live murderer looks like, real live killer? Have a good look. This is what they look like. Right now, you're about forty feet away from a cold blooded killer. For your sake I hope that's as close as you ever get to another one.... He is a cold blooded killer . . . It's a heart of stone over there." E. 306. The State claimed that Mr. Conyers had "ice in his veins," E. 300.

These were appeals by counsel for the State for the jury to consider improper issues in their deliberations, to reach their decision on some other basis than the facts and law in the case, an improper appeal to the jury's emotions, and an improper suggestion to the jury that they should be afraid of Mr. Conyers. The State told the jurors they were close to a killer and hoped they never got closer, an unfair threat which violated due process.

The sentencing summation was similarly flawed. As it had in the guilt/innocence proceeding, at sentencing the State argued Johnson's credibility and claimed that his testimony had been verified by the police. E. 597. As it had in the guilt/innocence proceeding, at sentencing the State argued Johnson's credibility and claimed in addition that his testimony had been verified by the police. E. 597. The State misstated the evidence and the truth, especially regarding its verification of Johnson's testimony. Furthermore, in the sentencing argument the prosecutor attempted to reduce the State's burden of proof with respect to principalship in the first degree, E. 646-647, but see E. 593; demonized the defendant with impermissible name-calling, E. 606 ("Conyers is a cold blooded career criminal"); shifted the burden of persuasion so that the jury would believe that evidence of mitigation must outweigh the crime in order

to give a life sentence, E. 658 ("What could outweigh what he has done? What could outweigh the seriousness of this crime or even come close to being in equal balance to it?"); and, invited the jury to engage in inflammatory speculation as to the victim's final moments while informing them that the thought of it sent chills through his spine, E. 652-653 ("[T]hen you sit and you think of exactly or most likely the hell that she was going through at that moment"). This outrageous argument was not objected to by sentencing counsel. No competent attorney in a capital sentencing would have sat silent through each and every one of these claims.

The closing arguments alone, apart from the many other issues in this case, require a new trial, or, in the alternative, a new sentencing.

CONCLUSION

For these reasons, the Court should not issue the writ of certiorari in this case.

Respectfully submitted,

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